Congress of the United States

Washington, DC 20515

April 29, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities (MM Docket No. 97-182, FCC No. 97-296).

Dear Ms. Salas:

We write to express our views on the environmental impact of possible preemption of local land use and zoning laws regarding the siting and construction of digital television towers. This comment comes in response to the Federal Communications Commission ("FCC") Mass Media Bureau Public Notice of March 6, 1998 (DA 98-458), regarding the petition from the National Audubon Society ("Audubon") requesting the preparation of an Environmental Impact Statement pursuant to the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. Sec. 4332, regarding the proposed rule referenced above (FCC No. 97-296, MM Docket 97-182).

We strongly agree with Audubon. The proposed rule is major Federal action that may have a significant impact on the environment, and the FCC should prepare an Environmental Impact Statement ("EIS").

Legal Requirements and Agency Precedent

NEPA requires the preparation of an EIS for every "major federal action significantly affecting the quality of the human environment."[1] This includes matters that may be precedential or may set policy, and in particular. those that affect or preempt state or local environmental or zoning controls.

A principal goal of NEPA and the rules implementing it is to minimize the environmental impacts of action by Federal agencies.[2] Preempting state or local environmentally-oriented requirements thwarts this goal. Zoning controls are the principal and

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[1] 40 CRF Sec. 1508.18.

[2] 40 CFR Sec. 1502.1.

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"first line" of environmental defenses. This is because they are the principal means of making sure that inappropriate uses do not occur in environmentally sensitive areas. As a result, Council on Environmental Quality rules ordinarily require an EIS for Federal action which "threatens a violation of Federal, state or local law or requirements imposed for the protection of the environment."[3] Further, Federal agencies must consider conflicts of their actions with state and local government regulations, involve affected state and local governments in the environmental process,[4] and to the extent possible remove such conflicts.[5]

The FCC in fact has a long history of recognizing state and local government jurisdiction with respect to land use law. For example, more than twenty years ago, in an agency Order to implement NEPA, the FCC formally acknowledged that Federal preemption of local control over land use decisions, particularly with respect to aesthetics, would be improper and would raise questions of constitutionality:

> *"[L]ocal zoning and planning authorities have an important role. Their approval as well as the Commissioners is required; their disapproval of a site on the basis of land use considerations is conclusive."*[6]

> *"Local, State and regional land use authorities and Federal agencies responsible for the management of Government land are obviously better situated than the Commission -- by location, experience, and awareness of local values -- to deal with land use questions. Commission interference with common land use determinations traditionally made at the local level would under most circumstances place a considerable strain on our concept of the Federal system. . . . Deference will be accorded to [local, State and regional land use authorities'] rulings and their views, particularly in matters of aesthetics and when the record demonstrates that environmental issues have been given full and fair consideration."*[7]

We note that over the past twenty-four years, the agency's support of state and local control over land use questions has not diminished. One month ago, the Chairman of the FCC

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[3] 40 CFR Sec. 1508.27(b)(10).

[4] 40 CFR Sec. 1502.16(c), 1501.7, 1503.1(a)(2)(I), 1506.6(b)(3)(I).

[5] 40 CFR Sec. 1502.16(c), 1506.2(d).

[6] 49 FCC 2d 1313, 1324 (emphasis added).

[7] 49 FCC 2d 1313, 1328-1329 (emphasis added).

reaffirmed FCC policy in this area:

> *"It's my belief that the FCC should only consider preempting local zoning authority as a very last resort. I do not believe fundamentally that the heavy hand of federal government in preempting local authority is going to solve this problem. I don't want to convert this agency into a super zoning authority."*[8]

The proposed rule also puts the FCC on the wrong side of the history of environmental policy in the United States. The general pattern in U.S. environmental statutes is not to weaken local or state environmental laws, but if anything to strengthen them. The typical provision in federal laws allows states to adopt environmental regulations that are as strict or more strict than the federal standard, but not less strict. One example is state implementation plans under the Clean Air Act, which may be stricter than needed to attain the national ambient air quality standards.[9] Other examples may be found in the Clean Water Act,[10] Resource Conservation and Recovery Act,[11] Safe Drinking Water Act,[12] and Toxic Substances Control Act.[13] To break with precedent and unilaterally weaken state environmental laws as this rulemaking proposes warrants careful and full environmental review.[14]

We enclose as an appendix a list of local or state governments who have written to

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[8] Statement of The Honorable William E. Kennard, March 9, 1998, *in* Radio Communications Report, March 16, 1998, Vol. 17, No. 11, page 49. Similar remarks were made earlier this year by the Chairman: "...local governments argue -- legitimately -- that they need to protect their communities, as they have always done, by deciding where these new towers will be built," as quoted in "Preempt local authority on broadcast towers? Only as "tool of last resort" Federal Communications Commission officials say," County News (National Association of Counties newspaper), February 2, 1998, Page 2.

[9] Clean Air Act, Sec. 110, 42 U.S.C. Sec. 7410, (as interpreted in Union Electric Co. v. EPA, 427 U.S. 246 (1976)).

[10] Clean Water Act, Sec. 510, 33 U.S.C. Sec. 1370 (limits on discharges of pollutants into navigable waters).

[11] Resource Conservation and Recovery Act, Sec. 3009, 42 U.S.C. Sec. 6929 (hazardous waste regulation).

[12] Safe Drinking Water Act, Sec. 1414(e), 42 U.S.C. Sec. 300g-3(e) (regulation of drinking water or public water systems).

[13] Toxic Substances Control Act, Sec. 18(a)(1), 15 U.S.C. Sec. 2617(a)(1) (regulation of chemical substances or mixtures).

[14] 40 CFR Sec. 1508.27(b)(6); 1508.18(b)(1).

FCC in opposition to the proposal. This list is not a complete list of all of the governments who oppose the proposal, but we note that the vast majority of those listed have stated that the loss of land use regulation as the primary reason for their opposition to the proposal.

Environmental Impacts

The Commission should review its own 1974 Order regarding NEPA for a thorough discussion of the environmental impacts of towers.[15] The Order includes descriptions of visual impacts, impacts in relation to zoning, impact on residential areas and those with scenic, recreational and other comparable areas. Sections of the Order discuss aesthetic impacts of towers, as well as impacts on wetlands, sensitive areas and migratory birds.

The proposed rule would potentially preempt all state and local land use laws including Vermont's premier environmental land use law known as Act 250, as well as similar laws and regulations. Act 250 is the only state law designed to protect habitats, effectively enabling the state to accommodate development while protecting many thousands of acres of habitat for bear, deer, and other species dependent on large. undeveloped tracts of land. The construction of broadcast facilities, including service roads, in remote, high elevation areas of the state of Vermont without appropriate local control will lead to a loss of important habitat for many important species. Act 250 also specifically protects high elevation regions by requiring a special permit for any development above 2500 feet in elevation. This provision of Act 250 has had the obvious effect of minimizing harm to fragile, high-elevation ecosystems. A preemption of this protection would lead to greater harm to fragile, high-elevation ecosystems. Finally, Act 250 provides for the consideration of the aesthetic impact of development. The consideration of aesthetics is not simply a question of local tastes. Vermont's image and unspoiled scenic beauty are essential to the state's thriving tourism industry, drawing millions of visitors to the state annually. By prohibiting the State of Vermont, under Act 250, to consider aesthetics when approving a permit to construct a large broadcast tower, the proposal jeopardizes the scenic beauty and character of the state.

For a further discussion of environmental impacts, we respectfully suggest that the Commission review the attached Comment of the State of Vermont Office of the Attorney General, which was submitted to the Commission on April 14, 1998.

Impact on State and Federally-owned Scenic and Recreational Areas

The spine of the southern Green Mountains of Vermont is home to more than 145 miles of the Appalachian National Scenic Trail. This footpath, which runs from Maine to Georgia,

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[15] 49 FCC 2d 1313.

is enjoyed by three to four million hikers annually. Unlike some National Scenic Trails, the Appalachian Trail is a unit of the National Park Service. The proposed rule to allow for the construction of broadcast facilities (not merely DTV facilities) despite the will of local zoning authorities would jeopardize the scenic and wildlife values that the Trail provides. We believe that environmental review of the proposal's impact on the Trail is warranted.

The Appalachian National Scenic Trail was one of the two original scenic trails designated by the National Trail Systems Act of 1968, in which Congress has expressly separated scenic trails from other scenic environments and designated them for federal protection. According to Sections one and two of the Trails System Act, the eight National Scenic Trails are intended to provide for the "conservation and enjoyment of the nationally significant scenic . . . qualities of the areas through which such trails may pass," and such designation should "promote the preservation of" those outdoor areas.

More important, the Appalachian National Scenic Trail is perhaps the most biologically diverse unit of the entire national park system.[16] To date, federal investments in Trail acquisitions and protection total nearly $10 million in Vermont, and more than $137.5 million for the entire Trail. We believe that the environment alongside the trail may be significantly impacted as a result of the proposal, and the value of the large Federal investment in the Trail will be severely diminished. We do not believe that the public interests that are expressed in the Telecommunications Act necessarily outweigh the interests Congress expressed in passing the Scenic Trails Act and related spending measures.

Similarly, the State of Vermont has appropriated close to $3 million over the past decade to protect the greenway along a footpath, called the Long Trail, which runs the length of the state over nearly all of the highest peaks and ridges. Public funding has been matched by $3 million in private donations, which have been used to specifically protect the trailway from development. We oppose any rulemakings that would restrict the planning process which

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[16] "[T]he Appalachian Trail and its associated corridor represent an important reservoir of biological diversity. For example, the trail, due to its great latitudinal extent, passes through four of the seven primary forest habitats of North America. Moreover, recent natural-diversity inventories conducted by the Appalachian Trail Conference and a variety of state natural-heritage programs have identified 1,472 occurrences of rare, threatened, or endangered plants and animals at 402 sites along the approximately 84 percent of the trail route that has been surveyed to date. These findings have led a number of natural scientists to conclude that the trail and its green way will play an increasingly important role in ensuring critical habitat for many species of flora and fauna in the eastern United States. These findings also rank the Appalachian National Scenic Trail as perhaps the most biologically diverse unit of the national park system." Testimony of David N. Startzell, Executive Director, and David B. Field, Chair, Board of Managers, Appalachian Trail Conference, before the U.S. House Appropriations Subcommittee on Interior and Related Agencies, March 3, 1998.

governs where towers may be sited, and perhaps lead to decreased recreational or scenic values that the Trail provides to Vermonters and millions of visitors annually.

"Constructive Dialogue" Should Include Full Consideration of Environmental Impacts

We note as above that an EIS under NEPA is intended to promote a discussion about the possible environmental impacts of an agency action and include alternatives or steps to be taken (including no action at all)[17] that would minimize such impacts. We applaud the Chairman of the Commission, who seeks a compromise solution and is trying to promote what he calls a "constructive dialogue" toward that end between the broadcast industry and representatives of state and local government.[18] However, we feel strongly that this discussion should not take place in a vacuum. Given the impacts that broadcast facilities have on the ground, as well as their aesthetic impacts, we do not believe that a dialogue can be constructive or solve the differences unless all parties are fully aware of the environmental impacts of the proposal that stands before them. Such environmental impacts can be fully aired, discussed, researched, and documented best through an Environmental Impact Statement. NEPA is a primary environmental law in this country, and we think it unwise and unjustified in this instance for the agency to steer clear of the environmental review process that it mandates.

We thank the Commission for the opportunity to comment on this matter.

Sincerely,

Bernard Sanders
Member of Congress

Patrick Leahy
United States Senator

James M. Jeffords
United States Senator

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[17] 40 CFR Sec. 1502.14.

[18] "[FCC] are actively pursuing initiatives that we hope will render any commission action limiting State and local authority unnecessary. Commission staff, working with the Commission's Local and State Government Advisory Committee, is bringing together representatives of industry and municipal governments to discuss mutually acceptable solutions to the challenges posed by facilities siting. I believe that preemption of local zoning authority should be a remedy of last resort, and that we should not consider preemption until the possibilities for constructive dialogue have been exhausted." Text of letter from The Honorable William E. Kennard to The Honorable Bernard Sanders, M.C., Washington, D.C., March 6, 1998.

Enclosures

cc: Chairman William E. Kennard
Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Harold W. Furchtgott-Roth
Commissioner Gloria Tristani
Roy J. Stewart, Chief, FCC Mass Media Bureau
Kathleen McGinty, Chair, Council on Environmental Quality
EPA Office of Federal Activities
John M. Fowler, General Counsel, Advisory Council on Historic Preservation
Jamie R. Clark, Director, U.S. Fish and Wildlife Service

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APPENDIX

Opponents to FCC No. 97-296, Preemption of local and state laws for DTV facilities

State of Vermont Attorney General
Vermont Environmental Board
State of Connecticut, Attorney General
State of New Jersey, The Pinelands Commission
Commonwealth of Massachusetts, Attorney General
City of New York, Department of City Planning
City of Columbus, OH, Mayor
City of Boston, Office of Corporation Counsel
City of Philadelphia, Office of Corporation Counsel
Oregon League of Cities
Virginia Association of Counties (25 counties)
City of Pheonix, Parks and Recreation Dept
City of Portland, OR, Bureau of Planning
Tennessee Association of Counties
City and County of Honolulu, HI
City of Chicago, Office of Corporation Counsel
National League of Cities
City and County of San Francisco
City and County of Denver
City of Detroit
City of Las Vegas
City of Dallas
City of Seattle
State of Alaska
Wisconsin Counties Association
City of Pheonix
Association of Towns, New York
County of York, VA
Tahoe Regional Planning Agency
City of San Luis Obispo
Pinellas County, FL
Tennessee County Services Association
Montgomery County, MD
City and County of Honolulu
DeKalb County, GA
Town of Hultett, WY
Orange County, FL
Northampton County (VA)

Albemarle County, VA.
King County Department of Development and Environmental Services
FCC Local and State Government Advisory Committee
Clackamas County, OR
Virginia Municipal League
Transylvania County, NC
Will County Board, IL
Arlington County, VA
City of Winston-Salem, SC
Cape Cod Commission, MA
Fairfax County, VA
County of York, VA
City and Mountain Views, CO
Allen County Dept.
Freemont County Planning, WY
Township of Ferguson, PA
City of Indianapolis, IN
Washington County, ID
City of Ormond Beach, FL
Institute of Natural Therapies, MI
Surry County, NC
Frederick County, VA
Hamilton County, OH
Payette County, ID
County of Lancaster,
Derek Bishop (HI)
City of Hazard, KY
City of Culperer, VA
City of Dallas, GA
City of Goshen, IN
San Juan County, WA
South Carolina Assoc. Of Counties
Montrose County, CO
Pennington County, SD
Rapid City, SD
Saint Clair County, IL
City of Ottumwa, IA
County of Cassia, ID
Village of Chelsea, MI
Dodge County, WI
Jefferson County, CO
City of Weslaco, TX
Gilford County, SC

City of Mayfield, KY
Groveland Township, MI
City of Springfield, MO
Charter Township of Vienna, MI
Charter Township of Harrison, MI
City of Duncanville, TX
Warren County, VA
Halifax County, VA
Richland County Council
Kern County, CA
City of College Park, GA
Palm Beach County, FL
City of Suffolk, VA
Town of Paradise Valley, AZ
Phoenix Mountains Preservation Council, AZ
Riverside County, CA
City of Lakewood, CO
Adams County, CO
City of Arvada, CO
City of Aurora, CO
City of Brighton, CO
City of Castle Rock, CO
City of Cherry Hills Village, CO
City of Commerce City, CO
Douglas County, CO
City of Englewood, CO
City of Edgewater, CO
City of Glendale, CO
City of Golden, CO
City of Greenwood Village, CO
City of Lafayette, CO
City of Lakewood, CO
City of Littleton, CO
City of Northglenn, CO
City of Parker, CO
City of Sheridan, CO
Town of Superior, CO
City of Thornton, CO
City of Westminster, CO
City of Wheat Ridge, CO
City of Coconut Creek, FL
City of Deerfield Beach, FL
City of Fort Lauderdale, FL
City of Breese, IL

City of Naperville,IL
City of Rockford,IL
City of St.Charles,IL
Village of Lisle,IL
Village of Western Springs
Cook County,IL
City of Grand Rapids, MI
Ada Township, MI
Bloomfield Township, MI
Byron Township, MI
Canton Charter Township, MI
City of Birmingham, MI
City of Cadillac, MI
City of Eaton Rapids, MI
City of Huntington, MI
City of Kentwood, MI
City of Livonia, MI
City of Marquette, MI
City of Rockford, MI
City of St. Clair Shores, MI
City of Walker, MI
City of Wyoming, MI
Elk Rapids Township, MI
Frenchtown Charter Township, MI
Gaines Charter Township, MI
Grand Haven Charter Township, MI
Grand Rapids Charter Township, MI
Groveland Township, MI
Handy Township, MI
Harrison Charter Township, MI
Robinson Township, MI
Scio Township, MI
City of Westland, MI
Yankee Springs Township, MI
Zeeland Charter Township, MI
City of Gladstone, MO
City of Springfield, MO
Bridgewater Township, NJ
City of Las Vegas, NV
City of Sparks, NV
Alamance County, NC
City of Archdale, NC
City of Asheboro, NC
City of Burlington, NC

Caswell County, NC
Town of Chapel Hill, NC
Davidson County, NC
City of Eden, NC
Town of Elon College, NC
Town of Gibsonville, NC
City of Graham, NC
Guilford County, NC
Town of Haw River, NC
City of High Point, NC
Town of Jamestown, NC
City of Lexington, NC
Town of Liberty, NC
Town of Madison, NC
Town of Mayodan, NC
City of Mebane, NC
City of Randleman, NC
Randolph County, NC
Town of Ramseur, NC
City of Reidsville, NC
Rockingham County, NC
Town of Yanceyville, NC
City of Canton, OH
City of Eastlake, OH
City of Lorain, OH
City of Grand Prarie, TX
City of Amarillo, TX
City of Arlington, TX
City of Cedar Hill, TX
City of Coppell, TX
City of Crowley, TX
City of DeSoto, TX
City of Fort Worth, TX
City of Haltom City, TX
City of Hurst, TX
City of Irving, TX
City of Kaufman, TX
City of Keller, TX
City of Kennedale, TX
City of Lancaster, TX
City of Laredo, TX
City of Longview, TX
City of Plano, TX
City of University Park, TX

City of Waxachie, TX
Town of Addison, TX
City of Abernathy, TX
City of Alamo, TX
City of Andrews, TX
City of Balcones Heights, TX
City of Belton, TX
City of Big Springs, TX
City of Bowie, TX
City of Brekenridge, TX
City of Brenham, TX
City of Brookside Village, TX
City of Brownfield, TX
City of Brownwood, TX
City of Buffalo, TX
City of Bunker Hill Village, TX
City of Burkburnett, TX
City of Canyon, TX
City of Carrollton, TX
City of Center, TX
City of Cisco, TX
City of Clear Lake Shores, TX
City of Cleburne, TX
City of College Station, TX
City of Conroe, TX
City of Corpus Christi, TX
City of Cottonwood Shores, TX
City of Crockett, TX
City of Denison, TX
City of Dickenson, TX
City of El Lago, TX
City of Electra, TX
City of Fredricksburg, TX
City of Friendswood, TX
City of Georgetown, TX
City of Grapevine, TX
City of Greenville, TX
City of Gregory, TX
City of Groves, TX
City of Harlingen, TX
City of Henrietta, TX
City of Hewitt, TX
City of Jamaica Beach, TX
City of Jacinta City, TX

City of Kilgore, TX
City of La Grange, TX
City of Lampasas, TX
City of League City, TX
City of Leon Valley, TX
City of Levelland, TX
City of Lewisville, TX
City of Los Fresnos, TX
City of McAllen, TX
City of Mexia, TX
City of Missouri City, TX
City of Navasota, TX
City of Nolanville, TX
City of Paris, TX
City of Pearsall, TX
City of Plainview, TX
City of Ralls, TX
City of Refugio, TX
City of Reno, TX
City of Richardson, TX
City of River Oaks, TX
City of Rosenberg, TX
City of San Marcos, TX
City of San Saba, TX
City of Seminole, TX
City of Seymour, TX
City of Smithville, TX
City of Snyder, TX
City of South Padre Isle, TX
City of Spearman, TX
City of Stephenville, TX
City of Sugar Land, TX
City of Taylor Lake Village, TX
City of Terrell, TX
City of The Colony, TX
City of Thompsons, TX
City of Timpson, TX
City of Tyler, TX
City of Vernon, TX
City of Victoria, TX
City of Provo, UT
Chesterfield County, VA
Essex County, VA
Botetourt County, VA

Shenandoah County, Va
Roanoke County, VA
Prince William County, VA
City of Falls Church, VA
City of Mayfield, KY
Bonner County, ID
Aiken County, S.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities	**FCC No. 97-296 MM Docket No. 97-182**
Re	
Comments Invited on Environmental Impact of Possible Preemption of Local Land Use and Zoning Laws Regarding the Siting and Construction of Digital Television Towers	**DA 98-458**

To: The Commission

Comments of the State of Vermont Office of the Attorney General

William H. Sorrell
Attorney General

Mary K. McCabe
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109 State Street
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April 13, 1998

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I. Introdution

The Vermont Office of the Attorney General, on behalf of the State of Vermont and all of its agencies and boards, files these comments in response to the Federal Communication Commission's March 6, 1998 Public Notice seeking comment on the issues raised in the *Petition for Preparation of an Environmental Impact Statement* filed by the National Audubon Society on December 1, 1997 ("Audubon Petition") in connection with the Commission's *Notice of Proposed Rule Making In the Matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities* (FCC No. 97-296, MM Docket No. 97-182) ("NPRM").

The NPRM requested comment on whether and in what circumstances the Commission should preempt certain state and local zoning and land use restrictions in conjunction with the siting, placement and construction of broadcast station transmission facilities. The Rule was presented to the Commission by the broadcast industry in a *Petition for Further Notice of Proposed Rule Making*. The broadcast industry contends that certain state and local zoning and land use ordinances present an obstacle to the rapid implementation of digital television service. The Audubon Petition alleges that the proposed Rule constitutes a major federal action affecting the environment requiring the preparation of an Environmental Impact Statement ("EIS") pursuant to the National Environmental Protection Act ("NEPA"), 42 U.S.C. § 4332. Audubon urges the FCC to reject the proposed Rule; or, in the alternative, prepare an EIS and solicit public comment on the EIS before making a decision on the Rule.

The State of Vermont strongly supports the Audubon Petition, and provides these comments in response to the two issues posed by the Commission in its March 6, 1998 Public Notice, i.e., (1) whether the proposed Rule would have a significant environmental effect such that an EIS must be prepared and (2) what is the environmental effect of the proposed Rule. As explained below, an EIS is required because the proposed Rule, when evaluated under the criteria outlined in NEPA and the Council for Environmental Quality ("CEQ") regulations, will have a significant environmental effect on the human environment.

II. Significant Environment Effect

NEPA requires the preparation of an EIS for every "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332, *et seq.*; 40 C.F.R. § 1508.18. "Major federal action includes actions with effects that *may* be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18 (emphasis added). A federal decision to preempt state and local laws governing the siting, placement, and construction of hundreds of broadcast towers is unquestionably a major federal action.

"Major" reinforces but does not have a meaning independent of "significantly." 40 C.F.R. § 1508.18. As used in NEPA, "significantly" requires consideration of both "context" and "intensity." 40 C.F.R. § 1508.27.

A. Context

Context refers to the setting of the proposed action. In other words, the "significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R.

§ 1508.27(a). For purposes of these Comments, the significance of the proposed Rule will be analyzed in the context of the Vermont region and its affected laws and interests;[1] however, this analysis applies equally to every state in the country with state and local zoning and land use laws designed in part or in whole to protect the environment.

1. Act 250

In 1969, confronted with rapid, uncontrolled development that threatened to undermine the integrity of the Vermont landscape, then Governor Deane C. Davis realized that environmental protection was an important priority to all Vermonters and proposed a comprehensive legislative response that became Vermont's premier environmental land use law. Codified at Title 10, Chapter 151 of Vermont Statutes Annotated, this law is known as "Act 250." Since June 1, 1970, under Act 250, the construction of improvements for a commercial purpose constitutes "development," and as such requires the prior issuance of an Act 250 permit.

Act 250 is Vermont's principal means of making sure that inappropriate uses do not occur in environmentally sensitive areas. As written, the broadcast industry's proposed Rule would potentially preempt and undermine all Vermont state and local zoning and land use laws including Act 250, and other "similar rule[s], or regulation[s]."

Vermont has achieved balanced environmental protection through the consistent application of Act 250's ten criteria in the quasi-judicial process. These criteria include potential air or water pollution, soil erosion, burden on municipal services, aesthetics, wildlife habitat and endangered species, rural growth, and consistency with local and regional planning documents. 10 V.S. A. § 6086(a)(1)-(10). The first step in obtaining

[1] The State's regional interests are discussed in greater depth under the heading "Examples of the Proposed Rule's Effect on the Human Environment."

an Act 250 permit is the filing of an application with a district environmental commission.

There are nine district environmental commissions, each with an assigned geographical area. The commissions are comprised of three citizen volunteers. A full-time coordinator is assigned to each district commission. The district commissions conduct their Act 250 permit application hearings as contested cases under Vermont's Administrative Procedure Act. 10 V.S.A. § 6085(a) and 3 V.S.A. Chapter 25. There are formal notice requirements to "statutory parties," and usually to adjoining property owners. Other parties are allowed pursuant to the Environmental Board's rules, although only statutory parties have appeal rights to the Vermont Supreme Court. 10 V.S.A. § 6085(c) and Environmental Board Rule ("EBR") 14; *In re Cabot Creamery Cooperative, Inc.*, 164 Vt. 26, 663 A.2d 940 (1995).

The applicant for an Act 250 permit always has the burden of going forward and producing evidence upon which affirmative findings can be made under all ten Act 250 criteria. The party that bears the burden of persuasion varies depending upon the particular criterion at issue. 10 V.S.A. § 6088. The allocation of the burden of proof operates in conjunction with the requirement that before a permit can be issued, the district commission must make the affirmative findings required under the ten Act 250 criteria.

Appeals from district commission decisions are to the Environmental Board. The Environmental Board is a quasi-judicial board comprised of eight citizen volunteers, and a full-time chair. The Environmental Board also employs an executive director, general counsel, three staff attorneys, and a chief coordinator. One staff attorney is specifically

assigned to serve the district commissions. Like the district commissions, an appeal to the Environmental Board is a contested case under Vermont's Administrative Procedures Act. The appeal is heard *de novo*. 10 V.S.A. § 6089. On appeal, the allocation of the burden of proof is the same as that before the district commission.

Since Act 250 went into effect on June 1, 1970, a communication or broadcast facility requires an Act 250 permit if it is to be constructed (a) above an elevation of 2,500 feet; or (b) on a tract of land greater than 1 acre in size. If the municipality in which the facility is to be constructed has adopted permanent zoning and subdivision, then the jurisdictional threshold increases from 1 acre to 10 acres. Since July 1, 1997, in addition to the aforementioned, any broadcast or communication facility that includes the construction of a support structure of 20 feet or more requires an Act 250 permit. The review extends to any ancillary construction such as equipment buildings, foundation pads, cables, wires, antennas or hardware, and all means of ingress and egress to the support structure. 10 V.S.A. §§ 6001(3); 6001(c).

As clearly expressed in Act 250's findings and declaration of intent, Act 250 was designed to control development, not to stop development. Rather than placing Vermont's hillsides off limits, the state environmental regulations insure proper siting of facilities by: (1) minimizing impacts to headwater streams, (2) insuring proper erosion control, and (3) avoiding injury or damage to critical habitat, endangered and threatened species and wetlands. In short, the proposed Rule will completely undermine Act 250 by removing necessary avenues of environmental oversight that lead to more environmentally sound siting decisions for broadcast towers.

2. "Similar law[s]"

The proposed Rule would preempt state land use laws "or similar law[s]" unless the state can demonstrate that the regulation is reasonable in relation to a clearly defined and expressly stated health or safety objective. While Vermont's primary concern is the proposed Rule's effect on Act 250 - a land use law - the Rule could be interpreted as preempting the many state environmental regulations that the Vermont Agency of Natural Resources ("ANR") administers, assuming environmental laws are considered "similar" laws.

Potentially, 37 environmental permitting programs administered by ANR would be preempted for transmission facilities. ANR's permitting programs cover all media and also involve the management of water quality, air quality, and solid and hazardous waste.

The proposed Rule also requires the state to show that a state law at issue is reasonable in relation to health and safety objectives in order to avoid preemption. If "health and safety" is defined in the narrow sense of human health and safety, it appears that most of the State's environmental regulations would be preempted. For example, Vermont's wetland regulations and state water quality standards are primarily concerned not with traditional human health, but with natural resource protection and aquatic health.

When viewed in the "context" of Vermont's state and local land use and environmental laws and the regional interests protected therein, the effect of the proposed Rule on the quality of the human environment is significant and demands the preparation of an EIS in accordance with NEPA and the CEQ regulations.

B. Intensity

Intensity refers to the severity of the impact, both beneficial and adverse. The CEQ regulations list ten factors that should be considered in evaluating intensity. These factors include, *inter alia*:

1. The degree to which the proposed action affects public health or safety. *See* 40 C.F.R. § 1508(27)(b)(2).

In other words, an impact on public health or safety is an environmental impact that must be considered in deciding whether the proposed Rule has a significant effect on the human environment. Health and safety concerns fall under the police powers traditionally vested with the states. Nevertheless, the proposed Rule, as written, would permit the FCC to broadly preempt the state's health and safety programs.

2. The unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas. *See* 40 C.F.R. § 1508(27)(3).

As previously stated, the proposed Rule would potentially preempt and undermine all Vermont state and local zoning and land use laws including Act 250, and other similar, rules, or regulations. Moreover, the proposed Rule provides no mechanism whatsoever for alternative environmental protection. In contrast, Vermont's state and local zoning and land use laws were written specifically to protect the unique characteristics of the geographic region including historic and cultural resources, park lands, farmlands, wetlands, wild and scenic rivers, and ecologically critical areas.

3. **The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.** *See* 40 C.F.R. § 1508.27(8).

As was the case above, the proposed Rule fails to provide for its adverse impact on significant scientific, cultural, or historical resources. Vermont's state and local zoning and land use laws were written precisely to protect these resources.

4. **The degree to which the action may adversely affect an endangered or threatened species or its habitat, that has been determined to be critical under the Endangered Species Act of 1973.** *See* 40 C.F.R. § 1508.27(9).

With hundreds of towers intended to be built within the next few years, preemption of state and local zoning and land use laws that apply to tower siting will likely adversely affect critical high elevation forested habitat necessary to sustain Vermont's wildlife. The proposed Rule simply fails to take into consideration the very real possibility of habitat destruction - regardless of status (endangered, threatened, or not). Vermont's Act 250 helps avert or reduce these impacts.

5. Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment. *See* 40 C.F.R. §1508.27(10).

A principal goal of NEPA is to minimize the environmental impact of actions taken by Federal agencies. 40 C.F.R. § 1502.1. Indeed, NEPA and the CEQ regulations require that Federal agencies (1) consider whether their actions conflict with state and local government regulations, (2) involve affected state and local governments in the environmental process, and (3) remove conflicts to the extent possible. *E.g.*, 40 C.F.R.